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To Buy or Not to Buy? Vulnerability and the Criminalisation of Commercial BDSM

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To Buy or Not to Buy? Vulnerability and the Criminalisation of Commercial BDSM

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Abstract

This paper examines the interaction of law and policy making on prostitution, with that of BDSM (bondage and discipline, sadism and masochism). Recent policy and legal shifts in the UK mark out prostitutes as vulnerable and in need of 'rescue'. BDSM that amounts to actual bodily harm is unlawful in the UK, and calls to decriminalise it are often met with fears that participants will be left vulnerable to abuse. Where women sell BDSM sex, even more complex questions of choice, exploitation, vulnerability, power and agency might be thought to arise. Does the combination of activities take two singular behaviours into the realm of compound harm? Are those who sell BDSM doubly vulnerable in a way that would justify criminal intervention? This paper argues that in imposing categories of vulnerability, the state engages in the heteronormative construction of risky sexual subjects who must be rehabilitated, responsibilised or punished. Through an examination of existing empirical studies on BDSM, the paper offers a feminist critique of the potential criminalisation of commercial BDSM and calls for more research on the lived experiences of those who buy and sell BDSM.

Keywords:

BDSM, criminalisation, prostitution, sex work, vulnerability.

Introduction: Regulating Sex Work and BDSM

‘The mark of any civilised society is how it protects the most vulnerable.’¹

In BDSM (bondage and discipline, sadism and masochism) and in prostitution,² consent is the key concept that renders legitimate an activity that might be thought exploitative and harmful. This article aims to examine how notions of choice, vulnerability, exploitation and harm (discourses that dominate debates on prostitution and BDSM), come into play, and take on new complexities when considering the issue of commercial BDSM sex.

While both Chancer (2000) and Deckha (2011) remind us of the dangers of false and antagonistic dichotomies that permeate feminist (and other) debates over issues such as sex work, there is a long running, familiar and deeply riven debate in feminist literature about the regulation of commercial sex. Since the Sexual Offences Act 1956, ‘prostitutes’ have been cast, amongst other things, as victims of abuse and exploitation of third parties, such as pimps, agents and clients (Day 2008). This approach is mirrored in some feminist work which frames prostitution as the epitome of the patriarchal, heterosexist commodification of women’s bodies (even though not

¹ Jacqui Smith, during the second reading of the Policing and Crime Bill, Hansard House of Commons Debates, 19 January 2009, column 524, regarding provisions on prostitution. Available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090119/debtext/90119-0010.htm>, column 524, last accessed September 2012.

² I have used the term ‘prostitution’ here to reflect the terminology of the criminal law. However, I also refer to ‘sex work’ when this term is used in the literature. My own normative position – that those who sell sex are more appropriately referred to as sex workers – should be apparent herein.

all prostitutes are women), where vulnerable women are taken advantage of by way of men's sexual demands and economic exploitation (Jeffreys 1997; for discussion see Scoular and O'Neill 2008; Chancer 2000). Others argue that some (if not many) women who choose to engage in sex work are rational, choosing agents whose autonomy and labour and welfare rights must be recognised and respected (Brooks-Gordon 2006; Agustín 2007; Day 2008). Notwithstanding these often oppositional views, Scoular (2010) argues that distinctions may well be 'illusory', since in practice, divergent approaches to the legal and social 'problem' of prostitution can produce similar results. And clearly, many feminists (and others) agree (to a certain extent) that while individual women can consent to sell sex, there are often complex and nuanced questions to be answered; for example, questions concerning the exercise of agency, the structural and material circumstances under which consent is given, the question of what constitutes consent, and the actual range of options open to those who make such choices (see Munro and Della Giusta (eds) 2008; on consent generally see Hunter and Cowan (eds) 2007).

Just as they have disagreed about sex work (whether it can ever be consensual, whether it is inherently exploitative and objectifies women, and who and when to criminalise), feminists have disagreed about BDSM. In the 1980s, the 'sex wars', pushed feminists into pro or anti BDSM positions. As Ardill and O'Sullivan (2005) note, you were in favour of either sexual liberation or women's liberation: you could not be in favour of both. For feminists who have argued against BDSM, the problem is that BDSM is "irredeemably connected to heterosexuality" even where practiced by lesbian women (Ardill and O'Sullivan 2005, 112). Thus, heterosexuality is inextricably connected to patriarchy (cf Walby 1989), and also, for some, facism

(Jeffreys 1994; see also Hawthorne 2005/6; Linden et al 1982). For example, MacKinnon's (1989) theory of women's sexuality suggests that since women are commonly subjected to coercive pressure or force with respect to sex / gender roles and indeed sexual intercourse itself, it is impossible to know whether or not a woman who seems to enjoy sex under conditions of force or coercion does so because she has been conditioned to see her sexuality in a masochistic way (see for example 1989, 148-149; 172; 177). In contrast to this 'false consciousness' argument, a more 'sex radical' feminism would re-read BDSM as an opportunity for women to step outside traditional gendered socio-sexual scripts of passivity and victimhood, and away from subordination laden protectionism (Cossman 2003, 620; Smart 1995), and to explore non-normative sexualities (Califia 1988; Rubin 1984). However, none of these accounts theorise fully the concept of vulnerability or how it can constrain or enable sexual agency.

Recent law and policy in this area has relied increasingly upon the notion of vulnerability to explain enhanced criminal penalties for engaging in 'risky' sex.³ Criminalisation as an appropriate response to sex work has long been debated; from the 19th century (Walkowitz 1980) through to the 1957 Wolfenden Report in the UK (Day 2008), and beyond, critics have noted that despite its rhetoric of protection of the vulnerable, criminalisation itself can further stigmatise, endanger and render vulnerable to exploitation women who sell sex (Brooks-Gordon 2010; Day 2008; Phoenix 2008; Kinnell 2006; Scoular and O'Neill 2008; McClintock 1993). Recent

³ This is not to imply that the notion vulnerability is the sole driver of current law and policy making.

Other discourses, such as disgust, have also been shown to be relevant to the ways in which recent criminal laws in this area have developed. See for example Johnson 2010.

criminal justice interventions that both criminalise demand and provide for the rehabilitation of prostitutes might be understood to reflect a progressive welfare based approach – as a way of ‘rescuing’ vulnerable women rather than punishing them - but have been roundly critiqued (Scoular 2010; Scoular and Sanders 2010; Brooks Gordon 2010; Sanders and Campbell 2008; Munro and Scoular 2012; Carline 2013), and commentators have queried whether the current approach makes life worse for the most vulnerable, since breach of a rehabilitation order can lead to detention (Day 2008; Scoular and O’Neill 2008).⁴ Some also suggest that investing in regulation that prioritises the protection and rehabilitation of ‘victims’ can also transform feminist campaigns, and concerns about violence against women into “techniques of control” (Scoular and O’Neill 2008, 22; Brown 1995).

Likewise, the courts in England and Wales have decided⁵ that SM should be regulated through the criminal law, in part on the grounds of the perceived vulnerability of some participants, and also because of the harm to society. However it has been argued that unless it causes very serious harm, BDSM is not an appropriate target of the criminal law (although critics disagree about where the line of ‘serious harm’ ought to be drawn (Egan 2007; citation removed for author anonymity; Deckha 2011); rather than offering protection for the vulnerable, they say, criminalising BDSM constrains sexual autonomy and agency, diminishes one’s freedom to explore the self, disproportionately punishes and heteronormatively constructs sexual subjects

⁴ See also HoC Library Research Paper 09/04, 2009, p48-52; and HoC debate on the Second Reading of the Policing and Crime Bill, 19 January 2009, available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090119/debtext/90119-0010.htm>, last accessed September 2012.

⁵ *R v Brown* [1994] 1 AC 212

as either ‘risky’ or ‘responsible’. Recent legislation in England and Wales outlawing the possession of extreme pornographic images, including images of some kinds of SM sex, was in part justified by government concern about the offences committed in *Brown*, which was said to be a case of ‘sexual torture’.⁶

Against this background of criminalisation, and given recent law and policy approaches in the UK that have looked to vulnerability as a way of justifying criminalisation (see, further, Munro & Scoular 2013; Carline 2013), this paper will consider whether there might be good reasons to be concerned about commercial BDSM. First, I consider what might be meant by ‘vulnerability’, and how this might be relevant to debates about commercial BDSM. Then, by examining the existing sociological research on BDSM, I will consider arguments that commercial BDSM renders participants (and possibly society more generally) especially vulnerable, and should therefore be criminalised. Finally, I argue that more research needs to be done before any normative legal or policy position on commercial BDSM can be considered, and that in the meantime we should resist the criminalisation of commercial BDSM and pursue a more sex-radical and queer approach that does not assume vulnerability, nor assume the worst where there is vulnerability. Since most of the feminist (and some of the regulatory) concerns about commercial sex and about SM relate to law’s capacity to protect vulnerable women from exploitation, this article will focus mainly on the sale by women to men of BDSM sex. Researchers in this field refer variously to BDSM and SM; for the purposes of my argument, like Lindemann (2010), I will use both terms, referring to each where appropriate (for

⁶ Paragraph 803 of the explanatory notes to the Bill’s proposed offence, which now appears as section 63 of the Criminal Justice and Immigration Act 2008.

example, legal discourse uses the term SM rather than BDSM) and acknowledging subtle differences in their meanings for practitioners.⁷

Sex Work, BDSM and Vulnerability

BDSMers and sex workers attract social censure and criminal penalties, as noted above. But even if we agree that the criminalisation of SM and prostitution is inappropriate, might there yet be more reason to worry about, and therefore use the criminal law to discourage, commercial BDSM? Does the combination of activities take two singular behaviours into the realm of compound harm? Are those who sell BDSM sex doubly vulnerable in a way that would justify criminal intervention?

The term ‘vulnerability’ appears to have contemporary cache in grounding state regulation of risky sex. Those who sell sex and those who put themselves (and others) at risk through SM are said to be vulnerable (or abusive). Presumably the ‘rest of us’ who do not engage in such activities are not vulnerable, or at least not as vulnerable as those identified as risky sexual subjects. Yet Martha Fineman has recently theorised the concept of vulnerability, concluding that vulnerability is “universal and constant, inherent in the human condition”, and that as such we share “common vulnerabilities” (2008, 1), even while specific vulnerabilities are

⁷ For the purposes of this paper I assume that BDSM encounters are primarily erotic/sexual rather than criminal assaults. While some BDSM activity does not involve sexual intercourse or other ‘overt’ sexual acts (or indeed any harmful or injurious activity), participants tend to refer to BDSM practices as either sexual and / or erotic. For simplicity, in this paper I will refer to ‘BDSM sex’ to cover all forms of BDSM activity that take place in a sexual or erotic context.

“particular” (2008, 10). Fineman argues that rather than press for state recognition of the liberal autonomous choosing subject, we should embrace the notion of the “vulnerable subject” as “far more representative of actual lived experience and the human condition” (2008, 2; see also Butler 2006, 29-31). In contrast to negative interpretations of vulnerability as coterminous with victimhood, Fineman urges us to “reclaim” vulnerability as a “heuristic” concept (2008, 9). This would, she seems to suggest, allow us to examine how factors that are commonly folded into vulnerability are socio-politically and institutionally constructed.

Although Fineman seems to vacillate between treating vulnerability as constructed and as inherent, my argument builds on Fineman’s theoretical prompt to open up for inquiry the construction of individuals (and groups) as vulnerable. I argue that law and policy makers presume vulnerability (often alongside deviance) on the basis of normative conceptions of risky behaviour, or ascription of normative identity categories such as prostitute, sado-masochist etc (a similar critique has also been made of the psychoanalytic categorisation of sexual deviance, or ‘paraphilias’ (Moser and Kleinplatz 2005). This is not to argue that individual sex workers or BDSM participants can never be vulnerable; rather, that vulnerability is all too often assumed and projected, and then used as a basis for criminalisation, regardless of the lived realities of sexual subjects who constantly negotiate power, identities and relationships in their daily lives (see FitzGerald 2013). Rather than mark out individuals or identity categories as victims or irresponsible sexual subjects, there is potential for a broader recognition of vulnerability as a product of social and institutional interactions, which can be experienced in a variety of ways by all peoples, to be, as McRobbie suggests, “productive of new forms of sociability”, and

“conducive to developing wider modes of commonality and co-operation” (2006, 78). Similarly Braidotti claims that “knowledge about vulnerability and pain... forces one to think about the actual material conditions of being interconnected and thus being in the world” (2006, 250).

Although commercial BDSM is not currently on the legislature’s radar, since contemporary UK law and policy makers tend to rely on vulnerability (rather than simply, say, immorality) as a marker for regulation, the question is whether or not commercial BDSM renders participants doubly vulnerable, thereby raising valid concerns what would justify a concerted focus on its criminalisation. Should the criminal law turn its attention to commercial BDSM? Criminalisation, as theorists of criminal law have argued, should be a last resort, since it results in the harshest of penalties, and can have lasting, deleterious effects on those that it disciplines (Husak 2008; Ashworth 2000). Therefore to properly consider whether the sale of BDSM sex should prompt criminalisation, it is necessary to have regard to any existing empirical evidence about commercial BDSM. Are those who sell (or even buy) BDSM sex ‘vulnerable’ and need the criminal law’s protection?

In order to answer these questions, and either support or reject arguments for criminalisation, we must turn to existing phenomenological research that takes the stories and perspectives of BDSMers themselves into account so that any legal intervention in BDSM is not abstract or hysterical, or informed solely by the pathologising ‘psych’ discourses, but rather “grounded in the actual lived experiences of those who engage in it” (Taylor and Ussher 2001, 295). Similarly, and reminding us that pain is a cultural concept, ‘the experience of which varies widely across time, peoples and space’ (2011, 141), Deckha argues for a ‘world travelling approach’ – a

postcolonial method that underlines the importance of getting to know the ‘other’, and of being attuned to the “experiences of individuals who live in different worlds on a daily basis, travelling between the norms and practices of their marginalized subculture in the midst of a larger hegemonic culture” (2011, 134). In short, Deckha advocates for an approach to SM that highlights the need to look more broadly and comparatively at social practices that cause psychological or physical pain, yet nonetheless remain lawful, in order to understand what are the distinguishing features of SM particular practice that may make it problematic (see also Chancer 1992).

This approach invites us to challenge the criminal law’s operationalisation of the concept of vulnerability in debates about prostitution and SM as inconsistent and arbitrary when compared with other potentially vulnerabilising or exploitative social practices. In the sections that follow, then, I will first look at what little sociological evidence we have in the realm of commercial BDSM, before going on to ‘world travel’ and examine another example of BDSM sexual practice in order to tease out more fully some of these issues about pain, choice, vulnerability and sex. In line with Hoople’s (1996) argument about SM more generally, I will argue that one problem that BDSM sex workers face is the way in which society sees them. This is often at odds with how they may see and represent themselves.

What do we know about commercial BDSM?

There is little sociological research on commercial BDSM as compared with sex work and BDSM more generally. Presumably one reason for this is that, since both prostitution and SM entail criminal offences, the combination of the two

activities leaves the practice both doubly criminalised – and therefore potentially doubly invisible. Accessing the views and studying the lives of BDSM sex workers may pose practical and ethical problems for researchers. However, this section explores the empirical research that does exist (some of which refers to non-commercial BDSM), arguing that these studies can offer important insights as to how and when BDSM sex workers might be described as vulnerable.

A significant amount of research now exists that investigates the perceptions and activities of BDSM practitioners. In 2006, Weinberg reviewed much of this literature, noting the shift from early psychological approaches of Krafft-Ebing and Freud, who viewed sadism and masochism as pathological perversions (a view still present apparently in some contemporary clinical accounts), to more recent social science research that treats BDSM sexual interactions as complex “sociological phenomena” (Weinberg 2006, 19; see also Weinberg 1994; Taylor and Ussher 2001). However, none of the research reviewed by Weinberg focuses on commercial BDSM.

With respect to research specifically on the sale of BDSM, very little has been done. No academic research on the sale of BDSM sex by street based sex workers appears to exist. Lindemann’s recent (2011) US-based study with professional dominatrices (‘pro-dommes’) does shed light on this very under-researched ‘erotic sub-culture’, but is based on the experiences of women working indoors, in ‘dungeons’. Lindemann’s participants reported that they saw themselves as therapists, and therefore offering support and psychological release to those who express non-normative sexualities. These women do not perceive themselves as vulnerable; indeed, they see the men who visit them as vulnerable, either because those men do

not have satisfying sexual relationships, or because they need a kind of therapy or release that only the pro-domme can provide. This is not dissimilar to how some non-BDSM sex workers, including strippers, describe their relationships with clients.⁸ Both Lindemann's pro-dommes – and, they reported, their clients – are more likely to see BDSM as either recreation, a kind of 'letting off steam', or as a way of psychologically coming to terms with their own sexualities or an event or set of circumstances that psychologically damaged them. Lindemann uses the term 'erotic labour' to describe a range of practices that encompass anything from non-tactile humiliation, such as verbal abuse, to flogging or breath play. Very few of the women she interviewed reported engaging in more traditional sexual practices such as intercourse or oral sex with their clients, and did not define themselves as sex workers but as 'artists', in contrast to what they saw as 'phony' or 'fake' dominatrices, i.e. prostitutes (Lindemann 2010). Many of them saw themselves as falling on the artistic rather than commercial side of the spectrum of BDSM activity, even though they were paid for their services, and sometimes a good deal more than the 'fake' domme-prostitutes that worked in brothel-like dungeons (Lindemann 2010).

As well as demonstrating a tendency towards hierarchisation and valorisation of their skills, and stigmatisation of the 'prostitutes' whom they perceived as inferior because of their lack of expertise or specialism, and their engagement in low-end sex work, the language these pro-domme women used to describe their interactions with

⁸ See for example the response of 'Cee-anonymous' to Greta Christina's invitation to sex workers to tell their stories on her blog: <http://freethoughtblogs.com/greta/2012/04/23/sex-workers-an-invitation-to-tell-your-stories/>. See also <http://jezebel.com/373392/prostitutes-are-the-new-therapists>, last accessed September 2012; Weitzer (2012); Jeffrey and MacDonald (2006); For critique of this position and its 'normalisation' of sex work see Jeffreys (1997).

clients seems also to fit within medicalisation discourses. Here men (their clients were predominantly male) were ‘treated’ or ‘healed’ through the exploration of BDSM desires that might otherwise either cause them psychological problems, or be channelled into less consensual practices. Some respondents did not even classify themselves as sex workers. One of them expressed a preference for referring to herself as a “psycho-erotic worker” (2011, 161). While there may well be therapeutic aspects to sex in any context, as Lindemann rightly points out, the problematic aspects of the medicalisation of BDSM are, first that it lends itself to co-option by the psych disciplines, thereby demonising rather than positing BDSM as a viable sexual lifestyle (see also Taylor and Ussher 2001); and secondly, that it accords with conventionally gendered understandings of care work as being the responsibility of women (2010, 165-168). The therapeutic explanation strikes also an uncanny and uncomfortable chord with the views of those who support prostitution on the basis that it provides a sexual outlet that prevents rape (see for example Farley et al 2011).

Despite these negative features, Lindemann notes that the stories of these pro-dommes do not entirely map onto either psych disciplines or the ‘sexual outlet’ or therapy explanations of prostitution. The stigmatising or medicalising discourses that discipline BDSM are challenged by the notion that clients may *choose* vulnerability, especially where clients are upper-class or middle class, white males who bear high levels of responsibility in the work place; and pro-dommes are employing the therapeutic explanation as a ‘reverse discourse’ where medicalization becomes “reappropriated as an instrument of resistance against the disease paradigm” (2011, 168). Moreover, Braidotti reminds us that: “negative affects can be transformed” (2006, 248). Thus, in the BDSM context, even where previous abuse or pain that

individuals are playing out through BDSM exists, applying Braidotti's "nomadic vision of the subject, we need not see BDSM as a pathological manifestation of the "arrest, blockage and rigidification" of this history of abuse (2006, 235), but rather as what she refers to as activation, movement and engagement with – and transformation of - earlier pain for the purposes of positively affirming the affective self. This approach is exemplified by the performances of the late Bob Flanagan, discussed in detail below.

Non-therapeutic explanations for embracing BDSM that have been offered by other studies, such as participants in Beckmann's (2001) study (again, not of commercial BDSM) found that her SMers saw their behaviour as less risky than "regular" (i.e. penetrative) sex; as a response to HIV and AIDS, and, because of the focus on non-genital erogenous areas (see also Weinberg 2006), BDSM can promote safer sex. In this study, both heterosexual and gay male subjects reported also BDSM sex as a way of avoiding the normative constraints of penetrative sex (though it may well be that gay men engage in different kinds of BDSM, and that BDSM has different meanings for them, than for heterosexual men, or indeed heterosexual or non-heterosexual women – see Weinberg 2006). It is in this sense that Pa positions BDSM as part of the feminist project of exploring and creating a "post-procreative sex jurisprudence" (2001, 91). And though again not in a commercial context, Taylor and Ussher (2001) suggest that participants engage in SM for eight kinds of self-identified reasons (which, the researchers acknowledge, often overlap), which they categorise as follows: 1) SM as dissidence, 2) SM as pleasure; 3) SM as escapism; 4) SM as transcendence; 5) SM as learned behaviour; 6) SM as intra-psychic; 7) SM as pathology and 8) SM as inexplicable. None of the reasons given by those who

actually engaged in SM specifically characterise the participants as vulnerable.

Indeed, many of these SMers' own explanations and perceptions of their sexual interactions demonstrate the existence of agency, choice, agreed limits, mutual control, negotiation, and safe sexual practices.

We can speculate that many of these features translate across into the commercial BDSM context. However, since there is such a dearth of empirical research on the issue of BDSM sex work, it is impossible to be sure that there are not other issues for concern in the commercial realm. Clearly, not all BDSM occurs in the context of the sexual subordination of elite, wealthy, powerful men by dominant sex workers. And although women topping men may trouble heteronormative notions about sexual roles and desires, this is not entirely straightforward (Khan, 2009b; see also Mackinnon 1989, 178-9). Even in Lindemann's study, the pro-dommes describe a dynamic of clients trying to 'top from the bottom', demanding certain kinds of positions or activities – i.e. "being 'dominant' does not make the women here immune to the external pressures" of demand and financial viability (2010, 601-2). Being a pro-domme does not necessarily subvert the gender hierarchies at play in hegemonic heterosexual sexual encounters or within the workplace more generally (Lindemann 2010).

Moreover, since the nature and risk associated with sex work varies across time, culture and geographical space, we might well worry that, in the absence of empirical evidence to the contrary, street-based BDSM sex workers might be more vulnerable than these 'dungeon-based' pro-dommes, particularly where women are paid to be submissive rather than dominant (though again, there appears to be no

research in this area). In so far as this question tracks a concern about violence and vulnerability in street prostitution more generally (see Sanders and Campbell 2007), we should not generalise too broadly from the lived negotiations of vulnerability engaged in by these pro-dommes to all BDSM sex workers. We need to know more about the experiences of BDSM workers across a spectrum of different kinds of sex work, and it is here that we can turn to Scoular and O'Neill's argument for more feminist research:

“[T]he combination of social research and cultural analysis can provide a richer, more sensuous understanding of society and lived experience with a view to social change / transformation ... This knowledge can help us ... to re-imagine relationships between lived experience, social regulation, the culture of control, and policies for real social inclusion and justice” (2008, 27).

It is certainly true that we need more empirical research into the experiences of those who buy and sell BDSM sex. Meanwhile, we can inquire about other practices that implicate commercial BDSM, and by means of Deckha's (2011) 'world travelling' method, may offer some insights into how BDSM sex workers might be seen and represented, and what this might mean for their potential criminalisation.

Disability, BDSM and vulnerability as dissidence?

Another argument that might be made for the non-criminalisation of commercial BDSM and a more nuanced account of the presumed vulnerability of BDSM sex workers, based in the real experiences of people's lives, is prompted by

the work of New York performance artist, Bob Flanagan, who died in 1996 at the age of 43. The activities engaged in by Lindemann's pro-dommes are not conventionally considered to be a form of art or drama, even though the language and practice of BDSM relies heavily upon dramatic scenes, scripts and roles (Weinberg 1995; cf Stear 2009 on SM as 'make-believe'). Flanagan's performances *were* accepted, at least by some, as a form of art, and although he did not directly sell or buy BDSM sex, he did profit from art exhibitions and performances in which he displayed publically his SM sexual practices. Employing Deckha's world travelling methodology to explore the issues raised by Flanagan's artistic portrayals of his own masochistic sexual desires may help us to understand better some of the issues at stake in more directly commercial BDSM.

Flanagan's performances shocked and appalled many viewers, while fascinating others. His work explored the connections between the vulnerability and pain he suffered through his disability, and the medical decision-making over his body, which he could not control, and the vulnerability and pain he explored consciously as a practitioner of SM, over which he could exercise choice. His performances involved him playing out BDSM fantasies as performance art displays where he prompted viewers – often with humour - to question the boundary between performance and reality, pain and pleasure, desire and coercion, and therapy and torture (Reynolds 2007). Akin to Lindemann's pro-dommes, his BDSM practices demonstrated the connections between lived experiences of agency and domination, and power and vulnerability.

Flanagan's was not a campaigner of legal reform with the aim of achieving his sexual rights, but one of artistic rebellion and self-making, asking his audience to engage fully with his pain, both chosen through SM and imposed by his disability. However his performances, like the defendants' activities in *Brown* discussed earlier, were often represented as extreme, dangerous or deviant (Juno and Vale 2002, cited in Reynolds 2007). Furthermore, his performances (and those of others like him, for instance the US photographer Robert Mapplethorpe), while intended to explore the interaction of agency and vulnerability, simultaneously serve to represent the embodied vulnerabilities we are all subject to as humans and also as resistance to reductive and disempowering vulnerability discourses (Fineman 2008). Likewise, since the practice and politics of submission is an even less frequently researched BDSM role than that of pro-dommes (cf Hoppe 2011), the art / porn / bdsm films of the New York-based film maker and 'professional submissive', Maria Beatty, provoke us to rethink what we know about femininity, masochism and political agency, as well as the politics of desire (for discussion see Galt 2010; Jacobs, 1997; on the transgressive potential of the female masochist as sexual agent rather than victim see Dymock 2012; cf Khan 2009a).

In contrast, critical scholars point out that, some types of SM have become more fashionable and mainstream. Wilkinson (2009) claims that SM that is perceived to be kinky rather than injurious – spanking, tying up, etc – has been eroticised in popular culture and thus socially as well as legally marked out as inherently different from the kinds of behaviour engaged in by Flanagan or the defendants in *Brown*. Consider, for example Max Mosley's suit against the *News of the World* in 2008. Justice Eady ruled that with respect to his acts of commercial (heterosexual)

sadomasochism with prostitutes, Mr Mosley was entitled to privacy, no matter how unconventional his sex life.⁹ It may well be that this is not contradictory to the finding in *R v Brown* - although Mosley was paying for BDSM sex, perhaps neither he nor the sex workers was criminally charged because the level of 'harm' inflicted was so minor. However, as I have argued elsewhere, the level of harm is never the sole driver of criminalisation; even where injuries are extreme, criminal punishment is not inevitable, as in the case of *R v Slingsby*,¹⁰ where a man, having inserted his fist into his female partner's vagina whilst wearing a signet ring, was later acquitted of manslaughter when she died of septicaemia. In other words, although it might seem to be Max Mosley's, or indeed his sex workers', perceived lack of physical or psychic vulnerability or injury that makes this encounter non-criminal, it may in fact have more to do with our social expectations and norms around 'good' (kinky) versus 'risky' (sado-masochistic) sex.¹¹

⁹ In 2008 Max Mosley, the president of the International Automobile Federation (which runs Formula One car racing) successfully sued the British tabloid the *News of the World* for breach of privacy when they reported on his SM sexual 'orgies' that were alleged to have Nazi overtones. Mr Justice Eady held that Mosley was entitled to privacy, and that there was no evidence of Nazi behaviour. Mosley received 'record' privacy damages of £60,000. See <http://news.bbc.co.uk/1/hi/7523034.stm>, last accessed September 2012. For critique of the public/private divide as it relates to sexuality and sexual citizenship see Beckmann (2001); Lacey (1998); Stychin (1995).

¹⁰ (1995 Crim LR 570)

¹¹ I accept entirely, of course that the apparent absence of criminal prosecutions for commercial BDSM may also be explained by the fact that most commercial BDSM seems to happen indoors, and most criminalisation of sex work generally is targeted at street-based sex work (Sanders and Campbell, 2007).

This is not to say that Moseley's sexual encounters fully accord with hegemonic hetero-monogamous norms; rather that he does not altogether challenge those norms.¹² Although Mosley was engaging in multiple partner, commercial BDSM sexual power-play (including switching between dom/sub roles), the framework remained one of heterosexuality, and the court and press emphasised the 'kinky', low-end nature of his activities. Indeed the most problematic question that seemed to capture the attention of the public (and formed the basis of his suit against the News of the World) was whether or not Mosley had engaged in offensive behaviour by re-enacting Nazi scenes.

Popular culture has played a significant role here. Films such as *Secretary*, the press coverage of Max Mosley's libel suit, music, literature and adverts have all brought SM into the public imagination, and been vehicles for the portrayal of 'low-end' SM as sexy and titillating (rather than disgusting, risky and criminal) (Wilkinson 2009; Langdridge and Butt, 2004; Pa, 2001). Khan points to this popular culture embrace of kinky SM sex as having occurred only within "particular heteronormative strictures" (2009a: 117), or where, as Wilkinson (2009) warns, a 'heteropatriarchal' version of SM becomes the norm, thereby resulting in 'SM-normativity'. Here, it seems as though concerns about the potential vulnerability of those engaging in SM (whether commercial or not) can be assuaged where SM is cast, heteronormatively, as kink rather than as the extreme behaviours of sexual deviants; the question of vulnerability collapses on to the question of what kinds of SM are engaged in by whom. Likewise, as Khan (2009b) has argued, although law and other discourses, such as film, sometimes allow space for women to take on a dominant BDSM role

¹² I would like to thank an anonymous reviewer for prompting me to be clearer on this point.

(commercial or otherwise), this is often countered by a disciplinary move that attempts to contain the woman within a more traditionally heteronormative and submissive role.

In contrast to this rose-tinted depiction of kink, those who transcend the norm struggle to represent themselves in a 'sympathetic' way, or as meriting privacy. Deckha argues that where SM has "glamorous" – e.g. Hollywood - connotations, it is more likely to be publicly acceptable and idealised, but if it is perceived as the practice of a sexual 'underclass' then it can provoke anxiety about its sordid and deviant nature, thus revealing an 'othering' process "enabled by oppressive class and racial knowledges" (2011, 140). This presumably will be doubly so where BDSM occurs in the context of prostitution, which is an activity marked also by stigmatising 'othering' discourses (Scoular and O'Neill 2008). However, as Hoople notes, even where SM practitioners *do* get to represent themselves in popular culture, they may yet be read as (classed, racialised and gendered) caricatures, because they are "inserted into the dominant cultural codes that regulate the production of meaning within that field and which produce SM as kinky sex (eroticized misogyny, a cult of violence etc) in the first place" (1996, 197).

BDSMers can contribute to a mainstreaming process in their depiction of BDSM as just an extension of the 'natural' (and therefore no more worrying with respect to vulnerability than 'regular sex'). Even the pro-dommes in Lindemann's (2011) study understood their sex work as part of a spectrum of natural behaviours, with most of her participants demonstrating discomfort or rejection of some of the more 'extreme' requests, particularly where these involve racist behaviours and

stereotypes (see also Bauer 2008). Those who do ‘play by the rules’ insist that (good) BDSM is ‘safe, and consensual’, that extreme BDSM is very much in the minority, and that BDSM is really about the eroticisation of power relationships rather than violence in and of itself (Pa 2001; see generally Langdridge and 2007). Negotiation, consent, limits and safety are clearly important to many SMers note Taylor and Ussher (2001). As Weinberg explains, “in all subcultures, there are norms that serve to define members’ expectations and to control their interaction. For the bondage subculture, these involve the intertwined issues of safety and trust” (2006, 26).

However, alongside the call for legal and social acceptance of BDSM as a simple extension of the ‘natural’, there is a simultaneous move by other BDSM practitioners to represent the dissenting, transgressive and oppositional face of BDSM (Langdridge and Butt, 2004). As Taylor and Ussher (2001) point out, shifts within hegemonic sexual culture will inevitably lead to shifts within sexual subcultures; the mainstreaming of bondage and kink can prompt some BDSMers to mark themselves out as even more different through more extreme forms of dress and behaviour, stepping away from the safety of ‘conventional’ modes of BDSM towards the possibility of actual rather than contrived vulnerability. For instance, those who advocate RACK – risk aware consensual kink - argue that what is safe, sane or consensual (SSC) is entirely subjective, and that ‘edgeplay’ or consensual risk of bodily harm is commonly engaged in by BDSMers, even while they portray BDSM as SSC to the ‘outside’ world.¹³

¹³ See for example the short article by Cross available at <http://crossculturebdsm.com/educational-offerings/handouts-and-resources/ssc-vs-rack/>, last accessed September 2012.

It is therefore only the telling of “contradictory and often conflicting stories’ of BDSM that can demonstrate non-normative reinterpretations of what it means to be vulnerable, highlight the importance of allowing the voices of the presumed-vulnerable to be heard, and avoid the conflation of vulnerability with anti-normativity (Wilkinson 2009, 190). Some theorists are optimistic about the potential of SM to upset dominant social norms and heteronormative codes of gender (as well as race and class), to reveal, not only as Butler has said, “the performative status of the natural itself” (1990, 146),¹⁴ but also, it seems, the performative status of vulnerability itself. Flanagan’s performances, then, provide another kind of conflicting story about BDSM than that suggested by the Mosley case, thus demonstrating Weinberg’s point that to talk of BDSM is to talk of many subcultures, not just one (2006, 35-6).

Flanagan seems to have resisted assimilation - arguably his acts were too extreme to be appropriated by the mainstream, and, unlike now, his performances were not available via mainstream, highly accessible and popular media such as the internet, TV, billboards and magazines, but through what might be thought of as ‘higher’ culture, such as photography, art installations, poetry and video. However, Flanagan *did* represent himself, and this representation was not that of a vulnerable victim’s search for successful therapeutic interventions. As his poem ‘Why?’ makes clear, his aim was not to ask “why me?” but rather as much to dissent, rebel and provoke as it was to explore ways of playing with his pain and vulnerability.¹⁵ This is

¹⁴ Butler acknowledges that: “there is no guarantee that exposing the naturalized status of heterosexuality will lead to its subversion” (1993, 231).

¹⁵ Available at: <http://royalcaute.blogspot.com/2008/03/why-poem-by-bob-flanagan.html>, last accessed September 2012. See also Reynolds (2007, 43-44).

what Braidotti describes in her work on the ethical and political project to positively transform pain and vulnerability as: “a form of lucidity that acknowledges the impossibility of finding an adequate answer to the question about the source, the origin, the cause of the ill-fate, the painful event, the violence suffered” (2006, 49). A central aspect of Flanagan’s approach was to illuminate how much of the prevailing discourse around the sexual health and perceived needs of disabled people was deeply heteronormative and ‘vanilla’ (i.e. non-BDSM) (Reynolds 2007). Amongst other things, then, his art challenges us to consider the possibility that the availability of commercial BDSM opens up a space for some disabled people to explore their sexualities in an environment that is non-judgemental and empowering, as well as potentially resistant to heteronormativity. BDSM also has “the potential to illuminate relationships of dominance and submission in ‘real-life’ encounters – commercial and otherwise” (Lindemann 2010, 604).

Conclusion

The policy, legal and theoretical debates both about the regulation of sex work, and about the regulation of BDSM are informed by heteronormative and gendered assumptions about power, agency, risk and responsibility. Both sex workers and BDSMers are in contemporary legal discourse, vulnerable, abused and deviant. However those who engage in ‘soft-core’ or kinky BDSM, and those sex workers who choose to exit through rehabilitation are brought back within the realms of heteronormativity and responsibilisation. Sex workers who sell BDSM may be thought to be doubly vulnerable and / or deviant in a way that merits criminalisation,

and their experiences reduced to the delusional, dangerous activities of the pathological. But there are many explanations, grounded in lived realities and life ‘stories’ as to why people engage in SM, and Deckha reminds us of the importance of “integrating these articulations”, in order to better understand the sexual ‘other’ (Deckha 2011, p. 142; Taylor and Ussher 2001). As Carol Vance said in *Pleasure and Danger* all those years ago: “It is all too easy to cast sexual experience as either wholly pleasurable or dangerous; our culture encourages us to do so” (1984: p. 5).

The ultimate aim is to see beyond a dichotomised depiction of BDSM sex workers, as either vulnerable / exploitative of vulnerability, or in Deckha’s words to create a “responsible discourse about SM”, as well as about sex work (2011, p. 135). In so doing, we will take into account the contexts, histories, narratives and implications of the practice of non-normative sexualities, and the impact of tools, conceptual and moral, used by law, such as the public / private distinction, to regulate such practices (citation removed for author anonymity). This in turn makes any blanket move towards targeting commercial BDSM for criminalisation harder to justify.

It is of course true that those selling BDSM sex are potentially open to abuse and violence – and are therefore vulnerable: “S/M’s theatre of risk inhabits the perilous borders of transgression, power and pleasure, where emotions can slip, identities shift, inchoate memories surface out of control, or every day inequities be imported unexpectedly into the scene” (McClintock 1993, p. 111). However, we are all vulnerable to a greater or lesser degree, within sexual and non-sexual encounters, and in everyday materiality – this is what Butler refers to as “a vulnerability to the

other that is part of bodily life' (2006, p. 29). Contractualising and legalising the sale of BDSM does not automatically render participants immune to vulnerability. Nor is all BDSM inherently emancipatory (McClintock 1993). Indeed, as Foucault said, the point is that "not everything is bad, but that everything is dangerous, which is not exactly the same thing as bad" (1997, p. 256). Perhaps, then, we might say that all sex is potentially (productively) dangerous, and continually evokes the ever-present and fluid states of vulnerability we inhabit.

The problem, then, is not the presence of vulnerability in commercial BDSM, but the presumption of vulnerability and the powerlessness of the 'other', its conflation with the non-heteronormative, and its oft-supposed binary opposition to the safety, responsibility and agency of 'the rest of us', whose sexual lives do not need to be constrained by law. Arguing for the assessment of vulnerability on a case-by-case basis (Appel 2010) need not over-individualise the question of vulnerability, and should allow for the analysis of structural factors that can instantiate and perpetuate vulnerability. A more nuanced understanding of the desires, intentions, and consents of those who participate in BDSM, as well as those who sell sex, and the social structures within which they act, would challenge us to be more precise about the potential basis for criminalising the sale of BDSM sex.

Rather than speculate about or suppose vulnerability (or its lack), we need to engage in more research into the lived experiences of those who buy and sell BDSM sex - research that works in a participatory way with research subjects (Scoular and O'Neill 2008, p. 28) and that hears the voices of those who straddle, and attempt to negotiate, the doubly stigmatising heteronormative legal discourses of SM and

prostitution. Criminalisation can increase the risks faced by BDSM sex workers and any move in this direction must be resisted, as we tackle the political tension between the need to allow for agency, and ensuring that wrongful and harmful behaviour is appropriately regulated, such that the vulnerability of BDSM sex workers cannot be always-already assumed on the basis of identity or non-normative sexual activity, but understood as complex and constructed, yet material and lived. As Braidotti has argued: “A great deal of courage and creativity is needed to develop forms of representation that do justice to the complexities of the kinds of subjects we have already become” (2006, p. 244).

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